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No. 90-1709

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

EUGENIE PARNAR,
Petitioner,

vs.

GREEN, NING, LILLY & JONES,
Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE HAWAII SUPREME COURT

No. 14203

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Seventh Amendment to the United States Constitution and Rule 38(a), FRCP, the prevailing plaintiff is entitled to a jury trial on "legal" issues when the attorney moves for imposition and enforcement of an attorneys lien on the civil judgment.

2. Whether a state-law issue involving the scope of the right to a jury trial in a civil case involves a "Federal question" within the meaning of Rule 10(b) of the Supreme Court Rules and related case law, when the state constitution and procedural rules incorporate federal standards for determining the state-law issue.

PARTIES TO THE PROCEEDING

The names of all parties appear on the caption. With regard to names of parent and non-wholly-owned subsidiaries of corporations, the Court is referred to Note 1, infra.

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OFFICIAL AND UNOFFICIAL REPORTS OF DECISIONS

The decision of the Hawaii Supreme Court in this case is unreported. Its text is contained in the Appendix hereto.

JURISDICTION OF THIS COURT

The judgment of the Hawaii Supreme Court in this matter was entered January 31, 1991. See Appendix. No rehearing has been requested, ordered, or denied.

Jurisdiction is conferred on this Court with regard to this petition by 28 USC Section 1257 and Article 3 Section 2 of the Constitution.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED IN THE CASE

The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be reexamined in any Court of the United States, than according to the rules of the common law.

Article I, Section 13 of the Hawaii Constitution (former Article I, Section 10, as amended with respect to the amount in controversy) provides:

> In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

Rule 38(a), Federal Rules of Civil Procedure, provides:

> Rule 38. Jury Trial of Right
>
> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 38(a), Hawaii Rules of Civil Procedure, provides:

> Rule 38. JURY TRIAL OF RIGHT
>
> (a) Right Preserved. The right of trial by jury as given by the Constitution or a statute of the State or the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

This is an extension of litigation which arose out of Plaintiff-Appellant and Cross-Appellee ("Parnar") firing in 1975 by

Americana Hotels, Inc.[1] Trial Court found the firing to be unlawful.

On October 24, 1977, Parnar filed a complaint in the First Circuit court charging her employers with wrongful discharge, claiming they had conspired "to induce her to leave the jurisdiction and prevent her testimony before the grand jury" in a Federal criminal anti-trust investigation. *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 373, 652 P.2d 625 (1982) ("*Parnar I*"); Record on Appeal, Volume I ("RA-I") at 1-11.

On October 28, 1982, In *Parnar I*, the Hawaii Supreme Court reversed the trial court order granting summary judgment against Parnar, and remanded the case for trial. On April 24, 1987, after trial before the State Circuit Court, a jury awarded Parnar $2,075,000.00 in damages. RA-X at 169-171.

The present proceedings involve the trial court's award by motion of an attorney fees award in excess of $1 million to the law firm, Green, Ning, Lilly and Jones (GNLJ) which represented her at trial and on appeal from the judgment in her favor. Parnar's attorneys from 1985 to January, 1987 had been the firm of Schutter, Cayetano, Playdon (RA-III at 1 and RA-VIII at 9-10).

On the day of the trial, January 28, 1987, trial date, Schutter, Cayetano, Playdon became so angry and indignant at Parnar's rejection of a $115,000 settlement proposal that David Schutter threatened to have Parnar examined by a court-appointed psychiatrist and declared incompetent. 7/7/89 Tr. at 20-22.

An attorney friend of Parnar's was present when Schutter tried to coerce her agreement to settle for $115,000 by threatening: to file a Motion for Determination of Competency as a means to have a psychiatrist appointed who would declare her incompetent and then have someone else come along and, on her behalf, settle.

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[1] Counsel for Parnar have attempted to determine whether there is any parent company or non-wholly-owned subsidiary of Americana Hotels (cf. Rules 14.1 and 29.1, Supreme Court Rules) and believe there are not. Counsel note that although Americana Hotels was a party below, it would appear to have no interest in the within proceedings, which involve only fees allegedly owed by Parnar to her trial attorneys.

7/7/89 Tr. at 21. The friend was "astounded at that kind of conduct." Id. Parnar told her friend she believed the attorney/client relationship with Schutter was over, and asked him to help her find new counsel. 7/7/89 Tr. at 22-23. Parnar wanted to go to trial and her friend told her to tell the judge that. Id. Schutter carried out his threat and filed a mental incompetency motion, asking Judge Marcia Waldorf to order Parnar's mental examination. 7/7/89 Tr. at 22-23. Judge Waldorf denied the motion, but pressured Parnar to settle, and granted Parnar only 24 hours to find new counsel when she refused. 7/7/89 Tr. at 25. Parnar's friend encountered Lilly of GNLJ in a courthouse hallway on January 28, 1987, and asked him to consider stepping in. 7/7/89 Tr. at 26.

Parnar's friend told Lilly that Parnar needed someone to take her wrongful discharge case, to sue Schutter for malpractice, to handle disciplinary proceedings and to oppose Schutter's anticipated attorneys' lien. 7/7/89 Tr. at 32, 33. Lilly replied, "[y]es, I want to take the whole case." 7/7/89 Tr. at 35. Based on Lilly's promises, the friend ceased his efforts to contact other counsel for Parnar 7/7/89 Tr. at 39.

When Parnar retained GNLJ in February of 1987, her case was ten years old. RA-I at 1-11. She had been to the Hawaii Supreme Court for a precedent-setting decision in *Parnar I*, and Schutter's firm had labored two years preparing for a January 28, 1987, trial date. 7/13/89 Tr. at 48. When Lilly replaced Schutter and obtained a two-month continuance in the trial date, Administrative Judge Philip Chun "froze" the case. RA-VIII at 49-50. No further discovery was permitted. 7/6/89 Tr. at 30. Witness and exhibit lists were closed. 7/7/89 Tr. at 31. As attorney Charles Ferrera testified, "[t]he case was ready for trial." 7/13/89 Tr. at 53. Lilly "had to take the case as [he] found it on January 30, 1987." 7/6/89 Tr. at 33.

Parnar's trial commenced April 13, 1987. 7/6/89 Tr. at 54. It lasted six days. Id. Parnar was on the stand for four of them. Id. According to Lilly, Parnar "did an outstanding job." 7/6/89 Tr. at 48. Lilly was right. The jury believed her, and awarded Parnar over two million dollars in actual and punitive damages.

Sometime after Parnar's April 24, 1987, jury verdict, Parnar called her friend and said Lilly would not take the discipline and malpractice aspects of the Schutter case despite their original agreement to do so. 7/7/89 Tr. at 44. Parnar and her friend met with Lilly, and Lilly confirmed GNLJ's refusal to represent Parnar against Schutter because "it would deteriorate into a personality fight." Id.[2]

On April 13, 1989, GNLJ filed a Motion for Partial Enforcement of Attorney's Lien. RA-XII at 30-85. On April 21, 1989, Parnar filed a response, arguing inter alia that the trial court had no jurisdiction to determine attorneys' fees by motion, and demanding a jury trial. RA-XII at 90-111. It was Petitioner's assertion that while the imposition of an attorneys' lien was an "equitable" matter to be decided by the Court, the amount of the lien presented "legal" matters which must be submitted to a jury. (Id.)

The factual issues Parnar asserted that needed to be resolved by the finder of fact included: whether the fee agreement had been entered into in good faith, whether it was voidable because entered into under duress, whether the law firm had taken "unfair advantage," whether the contract had been breached, whether the fee was "reasonable,"[3] and whether it should be voided and the fees determined on a "quantum meruit" basis (RA-XIII at 125-33).

First Circuit Judge Hiroshi Oshiro denied a jury trial (7/6/89 TR. at 3) and conducted a hearing on July 6, 7, 12 and 13, 1989. Six witnesses testified. Michael A. Lilly, Wayne S. Parsons,

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[2] For an additional breach of contract by Lilly see his August 20, 1987 request to "upgrade" his role by including appellate work 7/6/89 Tr. at 64 and Parnar's refusal to change the agreement. 7/6/89 Tr. at 65.

[3] GNLJ asserted on appeal that only the "reasonableness" of the fee had been made the subject of the jury request. However, it is apparent from the above that broader issues were involved, since Parnar claimed that all issues related to "the amount found to be due from the client to the attorney" should be submitted to the jury. (Plaintiff's Memorandum in Opposition to Motion for Partial Enforcement of Attorneys' Lien, RA-XII, at 93)

Richard J. Kowen and Eugenie Parnar were called by GNLJ, and Larry L. Zenker and Charles J. Ferrera were called by Parnar.

After four days of hearings, Judge Oshiro told counsel, "I will review my notes this evening and probably contact you tomorrow." 7/13/89 Tr. at 80. Judge Oshiro contacted counsel by telephone on July 14, 1989, and told them he had granted GNLJ's motion. He did not hold a further hearing or state his reasons on record.

Judge Oshiro concluded that: 1) a two-page letter of intent signed by Parnar on February 2, 1987, created a binding contract requiring payment to GNLJ of a fee amounting to 49% of the $2,075,000 Parnar judgement, or 2) in the alternative, based on *quantum meruit*, GNLJ had supplied legal services worth $1,016,371.35. *See* Appendix A to Parnar's Opening Brief on Appeal.

On September 13, 1989, Judge Oshiro executed, unchanged, GNLJ's proposed findings, conclusions and order of GNLJ, giving GNLJ $1,016,371.76 in attorneys' fees and costs. RA-XIII at 275-276. (Appendix B, Opening Brief). Even utilizing GNLJ's contested time sheets, introduced at the hearing as Exhibit #10 (*see* Appendix F hereto) the trial court awarded GNLJ one thousand dollars an hour, or forty thousand dollars a week, for their efforts in the Parnar case, which was "ready for trial" when they took over. 7/13/89 Tr. at 53.

On appeal, GNLJ did not seriously contest the facts as set forth in Parnar's opening brief as to the work it did or did not do for her at trial and on appeal, which is condensed above; *see* Parnar's opening brief on appeal at 1-11, GNLJ's answering brief at 1, and GNLJ's opening brief on appeal at 4. This case implicates the jurisdiction of the Hawaii courts to hear constested civil matters without affording a trial by jury to the litigant demanding same. It appears that jury trial would have been available in this case if the dispute over attorney fees was raised by way of a complaint instead of a motion.

ARGUMENT

I

THIS COURT CAN AND SHOULD REVIEW STATE COURT DECISIONS ON QUESTIONS OF STATE LAW WHEN THOSE COURTS MISINTERPRET THE DECISIONS OF THIS COURT WHILE RELYING ON THEM AS BINDING OR PERSUASIVE AUTHORITY.

This Court has repeatedly granted certiorari in cases analogous to the present one in which State courts have interpreted State law, relying upon Federal precedent but reaching results under state law which are inconsistent with that Federal precedent.

A recent example of this practice is *Pennsylvania v. Finley*, 481 U.S. 551 (1987), involving the duties of appointed counsel in State *habeas corpus* proceedings. Justice Stevens, dissenting on the basis that certiorari should not have been granted, noted:

> In this case, the Pennsylvania Superior Court stated that it was applying "*Pennsylvania law* concerning procedures to be followed when a court-appointed attorney sees no basis for appeal." . . . As for federal precedents, the court simply stated that state law in the area was "derived from" this Court's 1967 decision in *Anders v. California* 386 U.S. 738. . . . [T]here is no basis for concluding that the Pennsylvania Superior Court's decision to remand this case stemmed from its belief that the Federal Constitution required it to do so. (481 U.S. at 570. Emphasis added by Justice Stevens.)

The majority opinion, not disagreeing with Stevens' characterization of the posture of the case, stated that the Court had granted certiorari because

> The [Pennsylvania Superior] court held that "*Pennsylvania law* concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal is *derived* from the seminal case of" *Anders v. California* 386 U.S. 738, 18 L.Ed.2d 493 (1967). (481 U.S. at 554. Emphasis added.)

Finley is consistent with *St. Martin Lutheran Church v. South Dakota* 451 U.S. 772, (1981) in which this Court held that South

Dakota's unemployment compensation tax statute was inapplicable to churches. The state tax was, however, modeled after Federal law, and this Court noted:

> The South Dakota Supreme Court's analysis depended entirely on its understanding of [federal law], and did not rest on any independent and adequate state ground. We therefore are at liberty to review the judgment, although literally, it concerns the construction of a state statute. While the South Dakota courts remain free to construe the State's own law differently, they deserve to be made aware of the proper and, here, significant interpretation of the intertwined federal law. 451 U.S., note 9 at 780. Similar results have been reached by the Court for as long as five decades; *see*, e.g., *Standard Oil Co. of California v. Johnson* 316 U.S. 481, 482-3 (1942).[4]

Thus, although the Court has stated that it may not grant certiorari if "the state court employed the decisions under the Federal Constitution merely as persuasive authority for its independent interpretation of the state constitution," *Minnesota v. National Tea Co.* 309 U.S. 551, 556 (1939), the above cases illustrate that this has not been the consistent practice for many years, if ever.

There are indeed very sound reasons for a more flexible approach when state law is grounded in Federal precedent, and especially where that was the reasoned intent. The fact that a court may have independent state grounds for its decision has never assured that those grounds are "adequate". Accordingly when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the Court

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[4] The *Standard* decision and its relevance to the scope of this Court's review has been widely discussed. *See*, e.g., Redish, infra, notes 196-201 and accompanying text. Additional examples of this Court's decisions in which the Court concluded that reliance of the state on parallel federal decisions in construing law was sufficient to conclude that there were no "independent and adequate state grounds" for decision: *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982), *Zacchini v. Scripps-Howard Broadcasting Co.*, 438 U.S. 562, 568 (1977), and *Delaware v. Prouse*, 440 U.S. 648, 652 (1979).

presumes that there is no such ground. *Michigan v. Long*, 463 U.S. at 1032, 1041-42. The independent state grounds doctrine is eroded when state courts rely on a misunderstanding of Federal law, because, as one commentator has remarked,

> [W]here a state court's decision seems to contain independent state grounds, a change in the state court's underlying premise about federal law should not be dismissed as irrelevant to the court's understanding of state law. Matasar and Bruch, "Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine," (1986) 86 Columbia L.Rev. 1291, note 68 at 1308.

See, e.g., *Three Affiliated Tribes v. Wold Engineering* (N.D. 1985) 364 N.W.2d 98, 104, in which the state of North Dakota reversed its view of *state* law on remand from this Court "because of what the United States Supreme Court has taught us."

Moreover, as one authority has pointed out,

> Even if the state has voluntarily chosen to rely upon parallel federal law, simply as a means of enriching and improving its own, the state has much to gain by having the highest federal court directly comment upon the state court's interpretation of parallel federal law. Similarly, the federal interest may benefit from such review in several ways. Initially, it is conceivable that the Supreme Court might find persuasive the state court's normative discussion of the competing policies surrounding an unresolved federal issue. Moreover, inclusion of such cases in the category of decisions reviewable by the Supreme Court could provide the Court with a wider selection of fact situations in which to develop federal law. In short, in the tradition of cooperative federalism, both state and federal systems have much to gain from institution of a dialogue between the courts of both systems. . . . this dialogue would be fully consistent with the political theory of American federalism and would produce the substantial systemic benefits traditionally thought to flow from the process of inter-federal exchange. Redish, "Supreme Court

> Review of State Court 'Federal' Decisions: a Study in Interactive Federalism," (1985) 19 Ga.L.Rev. 861, 901.

The field of civil jury trials is a prime candidate for fruitful "inter-federal exchange" because, as will be discussed below, although the Seventh Amendment and the *Federal Rules of Civil Procedure* ("FRCP") are not directly applicable to the states, nonetheless many states view Seventh Amendment and FRCP caselaw as persuasive in construing provisions modeled after Federal law, and some states, including Hawaii, have explicitly incorporated Federal standards. The following segment of this brief will examine the "federalization" of state civil jury procedure in more detail.

II

ALTHOUGH THE SEVENTH AMENDMENT IS NOT ENFORCEABLE AGAINST THE STATES THROUGH THE FOURTEENTH AMENDMENT, NONETHELESS THE SEVENTH AMENDMENT CASES OF THIS COURT ARE BINDING AUTHORITY IN HAWAII AND AT LEAST TWO OTHER STATES, AND PERSUASIVE AUTHORITY IN MOST OF THE REMAINDER.

The Seventh Amendment of the United States Constitution provides in relevant part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Article I, Section 13 of the Hawaii Constitution (former Article I, Section 10, as amended with respect to the amount in controversy) provides in relevant part:

> In suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved.

The language of these provisions is obviously indistinguishable. In *Harada v. Burns* (1968) 50 Haw. 528, 445 P.2d 376, 379-80, the Hawaii Supreme Court, pointed out that

> The origin of this section is the seventh amendment of the United States Constitution which provides for jury trials for common law actions involving more than twenty dollars. Rule 38(a) of the Hawaii Rules of Civil Procedure provides that "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States or the Territory shall be preserved to the parties inviolate." This rule, adopted in 1953, was taken verbatim from the Federal Rules of Civil Procedure 38(a) except for the addition of the words "or the Territory."[5]

The Court specifically held:

> The seventh amendment jury trial right is not binding upon the states. The decision in the instant case [whether a jury trial is required because the issue is "equitable" or "legal"], therefore, rests on interpretation of the constitution of Hawaii, its statutes, and its rules of procedure. However, since the Hawaii constitutional provision and rule of procedure were patterned after the Federal Constitution and Rules, the interpretation of those provisions by the federal courts are deemed to be highly persuasive in the reasoning of this court.

How "highly persuasive" the decisions of this Court are deemed to be was stated in a note in *Harada*: the deliberations of the Hawaii Constitutional Convention

> clearly indicate that the language of article I, section 10 [now section 13] "preserved" the language of the United States Constitution in order to "preserve" also the judicial interpretation. (Id, note 1, 445 P.2d at 380).

The State Supreme Court has never reversed the position that the Hawaii Constitution "preserves" Federal judicial interpretations of the right to a jury trial in civil cases. To the contrary, as recently as April, 1991, the Hawaii Supreme Court has held that a trial court must make a finding when no jury trial has been held or waived "that a right of trial by jury of some or all of the issues

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[5] With respect to the specific language of Hawaii Rule of Civil Procedure 38(a), which has been subsequently changed, *see* note 5, infra.

did not exist under the Constitution or statutes of the United States or the State." *Kimball v. Lincoln* (No. 14653, April 5, 1991), slip opinion at 9.[6]

While few states have language both in their constitution and their rules of procedure which, like Hawaii's, are nearly identical to the language of the Seventh Amendment and FRCP Rule 38(a), nonetheless, the overwhelming majority have language which is functionally indistinguishable on its face from the Federal language. The relevant language from the constitutional provisions of all fifty states is summarized for the convenience of the Court in Appendix I hereto. Almost all the states' constitutions provide that the right to a jury trial in a civil case is in substance to be "preserved" or to "remain inviolate." Virtually every state has adopted the same fundamental interpretation of the varying language: that "legal" claims are entitled to jury trials, while "equitable" claims are not. The rationale is that the constitutional provisions neither expand nor contract but "preserve" historical rights, and that the British courts at law had juries whereas those at equity did not. *Kugler v. Bonner Pontiac-Buick, Opel, Inc.*, (N.J. 1972) 295 A.2d 385; *Carter v. State Road Dept.*, (Fla.1966) 189 So.2d 793.

There is little if any reason for distinguishing between interpretation of the Seventh Amendment and interpretation of their own

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[6] Although the word "Constitution" was substituted for the words "Seventh Amendment" effective July 1, 1972, it is clear for two reasons that no substantive change was made: (1) The Hawaii Supreme Court has never reversed the position taken in *Harada*; and (2) while no legislative history regarding the actual substitution exists, the legislative history of the contemporaneous revision of Hawaii's statutes and rules relating to civil procedure, supports the view that these were technical changes. Specifically, in amending Haw. Rev. Stat. Section 635-13 to provide that "the right of trial by jury is given by the Constitution or a Statute of the United States or this State or conferred by a rule of court," the drafters intended to conform with HRCP 38, and cited *Harada* as authority for the source of the jury trial right. Report of Committee on Coordination of Rules and Statutes, Vol. I, (September 1971).

Kimball clearly confirms this interpretation.

constitutions. The vast majority of states, after all, came to statehood from being British territories with British common law tradition (e.g. Virginia[7]), American territories with mandatory compliance with the Seventh Amendment (e.g. Hawaii), or territories of other states which had followed the Seventh Amendment pattern themselves (e.g. Maine). Consequently, it is consistent with history that interpretation of the various constitutional jury trial provisions should be consistent with the Seventh Amendment, despite the fact that, as the Hawaii Supreme Court correctly observed in *Harada*, the Seventh Amendment is not made mandatory upon the states through the Fourteenth Amendment. *Harada v. Burns*, supra, 445 P.2d at 380.

If anything, the exceptions prove the rule. The one state (Texas) whose decisional law makes the jury right equally applicable to law and equity, comes from a non-common law tradition and consequently had to create as well as "preserve" jury trial rights.[9] The one state (Louisiana) with no jury trial rights "preserved" in its Bill of Rights,[10] had no jury trial right to "preserve" from its French code law tradition.

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[7] Virginia's Art. I, Sec. 11, par. 2 provides in relevant part "That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." The right to a jury in Virginia extends to cases analogous to those for which there was a jury right when the Virginia constitution was adopted, (common law but not equity) *Stanardsville Volunteer Fire Co. v. Berry* (Va. 1985) 331 S.E.2d 466.

The Maine constitution continues in effect jury trial rights under Massachusetts law at the time of adoption of the Maine constitution, *City of Portland v. DePaolo* (Me. 1987) 531 A.2d 669.

[9] Texas has a right of jury trial in equitable cases *San Jacinto Oil Co. v. Culberston* (Tex. 1907) 101 S.W. 197. This comes from Art. 5, Sec. 10 of the State Constitution; see *State v. Credit Bureau of Laredo, Inc.* (Tex. 1975) 530 S.W.2d 288. Texas obtained its independence from Mexico, so its constitution had to create rather than "preserve" jury trial rights. See Interpretive Commentary, West's Annotated Texas Constitution.

[10] Article I, Louisiana Constitution.

Many states, like Hawaii, explicitly rely upon the rulings of this Court in determining the scope of the right to a jury trial in civil cases. As examples:

Alabama Courts hold that its Art. I, Sec. 11[11] and the Seventh Amendment are not "materially different." *Poston v. Gaddis* (Ala.Civ.App. 1975) 335 So.2d 165, 167 cert denied 335 So.2d 169 (Ala.1976).

The Alaska Supreme Court relies upon U.S. Supreme Court "fair cross section" authority for determining the representativeness of civil juries, analogizing its constitutional provisions to Federal ones, *Malvo v. J.C. Penney Co.* (Alaska 1973) 512 P.2d 575.

In Delaware, the right to a civil jury trial is viewed as having been "modeled after the Seventh Amendment," and accordingly, the courts "will apply Seventh Amendment analysis and caselaw" in construing Art. I, Sec. 4 of its constitution[12] *Lacy v. Green* (Del. Super. Ct. 1981) 428 A.2d 1171, note 1 at 1176.

In Florida, the Supreme Court relies upon the Seventh Amendment decisions of this Court to determine the scope of the right to a jury trial in mixed equitable and legal proceedings *Hightower v. Bigoney* (Fla. 1963) 156 So.2d 501, 505. In determining whether there is a right to a jury trial, the courts look to the Seventh Amendment. *King Mountain Condominium Association v. Gundlach* (Fla. Ct. App. 1983) 425 So.2d 569, 571-71.

In Idaho, the Supreme Court has found the cases of this Court interpreting the Seventh Amendment to be "equally applicable" to interpretation of its Art. I, Sec. 7[13] *Neal v. Drainage Dist.No.2*, (Idaho 1926) 248 P. 22, 24.

With respect to Iowa's Art. I, Sec. 9,[14] the state Supreme Court has stated that "there is a nexus between interpretation of Iowa's

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[11] "That the right of trial by jury shall remain inviolate."

[12] "Trial by jury shall be as heretofore."

[13] "The right of trial by jury shall remain inviolate. . . "

[14] "The right of trial by jury shall remain inviolate. . . "

jury provision and the Federal provision," *Iowa Nat. Mut. Ins. Co. v. Mitchell* (Iowa 1981) 305 N.W.2d 724, 726, which justifies consistent construction of the two provisions, and indeed that "the intention of the two constitutional provisions is obviously the same," *Schloener v. Uhlenhopp* (Iowa 1946) 21 N.W.2d 457, 458.

Maryland's Declaration of Rights Art. 23, Par. 2[15] "may be identical in scope to the Federal right," *Franklin v. Mazda Motor Corp.* 704 F.Supp. 1325, 1335 (D. Md. 1989), citing Maryland caselaw which in turn relies upon Seventh Amendment cases in interpreting its own provision.[16]

> The Montana Supreme Court has "repeatedly held that the right guaranteed by the state Constitution[17] is the same as that guaranteed by the federal Constitution (Seventh Amendment) because the federal Constitution was the fundamental law of the territory at the time it was admitted into the Union as a state and the right as it then existed was preserved in the state Constitution." *Consolidated Gold and Sapphire Mining Co. v. Struthers* (Mont. 1910) 111 P.152, 155.

North Dakota courts have cited Seventh Amendment caselaw as binding or persuasive since before the state was admitted into the Union to the present day, *Gull River Lumber Co. v. Keefe* (Dakota 1889) 41 N.W. 743, 744, *Union State Bank v. Miller* (N.D. 1983) 335 N.W. 2d 807, 808, *Odden v. O'Keefe* (N.D. 1990) 450 N.W.2d 707, 708; like the Montana Supreme Court, that of North Dakota holds that its constitution[18] preserves rights

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[15] "The right of trial by jury of all issues of fact in civil proceedings in the several Courts of Law in this State. . . shall be inviolably preserved."

[16] *See*, also, *Pickett v. Haislip* (Md.Ct.Spec.App. 1967) 533 A.2d 287, 296, relying upon this Court's decisions on the scope of issues which should be determined by the jury in tort actions.

[17] present Art. II, Sec. 26 ("The right of trial by jury is secured to all and shall remain inviolate. . .")

[18] Present Art. I, Sec. 13: "The right of trial by jury shall be secured to all, and remain inviolate. . ."

under the Territorial law, which were the same as those under the Seventh Amendment, so that there is "no real difference" between the two constitutional provisions (Id).

Although Utah's constitutional language is substantially different from the Seventh Amendment,[19] nonetheless, the Utah Supreme Court relies upon the decisional law of this Court in construing its own constitution.[20]

West Virginia's Art. III, Sec. 13[21] is held to provide rights coextensive with the Seventh Amendment, *Criss v Salvation Army Residences* (W.Va. 1984) 319 S.E.2d 403, 406; the state constitutional provision "has essentially the same meaning as the Seventh Amendment to the U.S. Constitution." *Markey v. Wachtel* (W. Va. 1979) 264 S.E.2d 437, note 5 at 441.

These examples demonstrate that the Seventh Amendment decisions of this Court are nearly as influential in the field of state civil jury trials as if they were formally binding. Indeed, because of the link between state constitutions and territorial constitutions, the Seventh Amendment is in fact binding not only in Hawaii, but at least in Montana and North Dakota as well.

As it happens, the right to a jury trial in civil cases has been "preserved" not merely by the United States Constitution and the constitutions of many states, but by the Federal Rules of Civil Procedure. "Federalization" of civil procedure has proceeded

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[19] Art. I, Sec. 10: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

[20] *See, e.g. Noble v. Noble*, (Utah 1988) 761 P.2d 1369, 1371 note 4, *First Security Bank of Utah v. Banberry Development Corp.*, (Utah 1989) 786 P.2d 1326, 1337 note 49, and *International Harvester Credit v Pioneer Tractor* (Utah 1981) 626 P.2d 418, 421, note 2.

[21] "In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved. . ."

apace, and many states have adopted the Federal Rules wholesale, with the intent of incorporating Federal civil procedure into the state courts.[22] The result is an additional basis on which many state courts have concluded that they must follow Federal precedent with regard to the right to a civil jury trial.

As noted above, Hawaii's Civil Procedure Rule 38(a), like FRCP Rule 38(a), explicitly incorporates the jury-trial requirements of the Seventh Amendment; consequently, the Hawaiian courts are bound by Seventh Amendment requirements even though the Seventh Amendment is not directly binding on any state; *see Harada* and *Kimball*, supra. Similarly explicit language is contained in Rule 38(a) of the North Dakota Rules of Civil Procedure.[23] Whether or not a state with "federalized" civil procedure literally incorporates Federal Constitutional principles, there is an overwhelming consensus that as a general matter,

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[22] For general discussions of the "federalization" of state procedure, *see* Subrin, "Federal Rules, local rules, and state rules: uniformity, divergence, and emerging procedural patterns," 137 U. Pa. L.Rev. 1999-2051 (1989), and Oakley and Coon, "The Federal Rules in states courts: a survey of state court systems of civil procedure," 61 Wash. L.Rev. 1367-1434 (1986).

[23] "The right of trial by jury as declared by the Constitution of the United States or by the Constitution of the State of North Dakota or as given by a statute of the United States or of the State of North Dakota shall be preserved to the parties inviolate."

Federal caselaw construing the Federal Rules will be viewed as "persuasive"[24] or "presumptively authoritative."[25]

In short, the decisions of this Court construing the Seventh Amendment are binding through constitution or rules of procedure in at least Hawaii, Montana and North Dakota, and are highly persuasive if not controlling in numerous other states.

III

GIVEN HAWAII'S INCORPORATION OF SEVENTH AMENDMENT PRINCIPLES INTO ITS LAW ON THE SUBJECT OF CIVIL JURY TRIALS, THIS CASE DEMONSTRATES A CLEAR MISUNDERSTANDING OF FEDERAL LAW.

As will be discussed, infra, inconsistency in interpretation of Federal Constitutional principles bearing on the jury trial right has created conflict among the decisions of State Courts of last resort and in the Federal Circuits. Inconsistent adjudication of this important Federal question presents a compelling ground for

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[24] *Crommelin v. Fain* (Ark. 1981) 403 So. 2d 177, 185; *Drickerson v. Drickerson* (Alaska 1976) 546 P. 2d 162, 167; *Duran v. Lamm* (Colo. 1984) 701 P. 2d 609, 613; *Allder v. Hudson* (Del. 1954) 106 A. 2d 769; *Brown v. Brown* (Fla. 1985) 432 So. 2d 704, 706; *Georgia International Life Insurance v. Boney* (Ga. 1976) 228 S.E. 2d 731, 737; *David Steed and Associates v. Young* (Idaho 1988) 766 P. 2d 717, 719; *Pennell v. Western and Southern Life Insurance Company* (Ind. 1985) 474 N.E. 2d 1042; *Maine Central Railroad Company v. Bangor and Aroostook Company* (Me. 1978) 395 A. 2d 1107; *White v. Labdell* (Mont. 1984) 678 P. 2d 637, 641; *Lewis v. Sisberg Academy & College* (NC. 1974) 208 S.E. 2d 404, 406; *Land Office Company v. Clapp-Thomssen Company* (ND. 1989) 442 N.W. 2d 401, 403; *Smith v. Johns Manville Corporation* (R.I. 1985) 489 A. 2d 336, 339; *Jerkins v. McKinney* (Tenn. 1976) 533 S.W. 2d 275, 281; *In re Estate of Cassidy* (Utah 1982) 656 P. 2d 1023, 1024; *Peneschi v. National Steel Corporation* (W.VA. 1982) 295 S.E. 2d 1, 13 note 12.

[25] *Otts v. Gray* (Ala. 1971) 255 So. 2d 26, 31; *Rollins Environmental Services Inc. v. Superior Court* (Mass. 1975) 330 N.E. 2d 814, 818.

grant of certiorari under Rule 10.1(b) and (c) of the Supreme Court Rules.

Because the Seventh Amendment speaks in terms of "preserving" the right to trial by jury in "suits at common law," the fundamental rule of construction for the Seventh Amendment is:

> In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791. *Dimick v. Schiedt* 293 U.S. 474, 476 (1935).

As a general principle, this Court held, Maintenance of the jury as a fact-finding body is of such importance and occupies such a firm place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. 293 U.S. at 486.

Questions arise constantly as the law evolves, however, as to what factual disputes in the modern age constitute "suits at common law." Almost two centuries after the phrase was coined, this Court in *Pernell v. Southall Realty* (1974) 416 U.S. 363, 374-75 described the criteria for determining what is a "suit at common law" as follows:

> The phrase "suits at common law" includes not only suits 'which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." *Parsons v. Bedford* 3 Pet 433, 447, & L.Ed. 732 (1830) . . . [The Seventh] Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty.

The conceptual split between "legal" and "equitable" claims has been accepted in virtually every state in the Union.[26] This principle, of course, does not solve the whole problem, because it must still be determined what is "legal" and what is "equitable" or "admiralty," and must also be decided how to address cases which raise mixed "legal" and "equitable" claims. This Court has also adopted some general principles for resolving problems which arise in mixed "legal" and "equitable" proceedings.

Take, for instance, the case of *Beacon Theatres v. Westover* (1959) 359 U.S. 500, 510-511, in which the plaintiff brought an "equitable" claim for declaratory and injunctive relief, and the defendant brought a "legal" counterclaim for damages. This Court held, as a matter of construction of the Seventh Amendment and Rule 38(a), FRCP, that a final determination of the equitable claims could not be made in a manner which would jeopardize the right to a jury trial on the legal claims. Generally,

> [O]nly under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

This Court has repeatedly held that when a claim is based upon contract, the parties have

> a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any but also just what the contract is,

even if the suit is in the form of a complaint for injunction and an equitable "accounting," and equitable defenses are raised. *Dairy Queen v. Wood* 369 U.S. 469, 479 (1962). This Court held, generally, that the Seventh Amendment and *Beacon Theatres* require "that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury," and that this rule

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[26] As noted above, the only exception appears to be Texas, which does not come from a common law tradition and had no common law right to jury trials to "preserve," so created a general civil jury trial right.

applies even if "the trial judge chooses to characterize the legal issues as 'incidental' to equitable issues." (Id, 369 U.S. at 473).

In this case, as in *Dairy Queen*, there was a dispute over "just what the contract was" and indeed whether, as in *Dairy Queen*, there was an oral modification of the contract. The fact that what was sought here was enforcement of an equitable lien can no more deprive Ms. Parnar of a right to a jury trial on the contractual issues than could the fact that what was sought by the moving party in *Dairy Queen* was an "accounting."

This Court has decided virtually the same issue as was involved in the present case, under virtually the same facts: whether or not the client in a dispute over attorney fees may be denied the right to a jury trial merely because as a matter of form the question has arisen in an "equitable" context. In *Simler v. Conner* 372 U.S. 221, 223 (1963), the Court, having held that the issue of whether a case is "legal" or "equitable" for Seventh Amendment purposes is a matter of Federal law even though it arises under state law, summarized the facts and law on the subject as follows:

> On the question whether, as a matter of federal law, the instant action is legal or equitable, we conclude that it is "legal" in character. The record discloses that the controversy between the petitioner and respondent in substance involves the amount of fees petitioner, a client, is obligated to pay respondent, his lawyer. Petitioner admits his obligation to pay a "reasonable" fee under a contingent fee retainer contract stipulating that reasonableness may be set in a court trial. Respondent relies on a subsequent contract specifying 50% of the recovery, under certain circumstances, as the amount of the fee. Petitioner counters that the latter contract is the product of fraud and overreaching by the lawyer.
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> The case was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract, traditionally a "legal" action. The fact that the action is in form [equitable] should not obscure the essentially legal nature of the action. The questions involved are traditional common-law issues

which can and should have been submitted to a jury. (Citations omitted.)

The facts in *Simler* are stunningly similar to those in the present case, and the holding is dispositive, given the rule of the Hawaii Supreme Court that Article I Section 13's jury-trial provisions " 'preserve'. . . the judicial interpretation" of the Seventh Amendment (*Harada*, supra).

The state courts, in ruling on issues of attorney fees claims and imposition of attorney charging liens, while generally recognizing the constitutional basis of the jury trial right and the constitutional distinction between "legal" and "equitable" claims, have come to differing conclusions.[27] Of particular significance in the

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Arizona

Right to jury trial on attorney fees *Flieger v. Ash* (Ariz.Ct.App. 1980) 624 P.2d 1295.

Colorado

"[T]he burden is upon the attorneys to prove that the arrangements were fairly and openly arrived at and to prove the reasonable value of the services rendered [which] are questions of fact to be determined by the jury." *Taylor v. Barnhill* (Colo. 1970) 470 P.2d 902, 904.

Florida

Existence of an attorney fees contract is to be submitted to the jury, *Milton Kelner v. 610 Lincoln Road, Inc.* (Fla. 1976) 328 So.2d 193, 195)

Idaho

Enforcement of attorneys lien is "equitable," with no right to jury trial (Case had no legal counterclaim) *Skelton v. Spencer* (Idaho 1981) 25 p.2d 1072. *Neal v. Drainage Dist.No. 2* (1926) 248 P. 22, 24 - attorneys fees action, error not to allow to go to jury, citing Seventh Amendment. Where the attorney seeks to impose a charging lien and the client questions "whether fees have been earned and properly billed," the latter questions must be submitted to a jury, *Jarman v. Hale* (Idaho 1986) 731 P.2D 813, 818.

Minnesota

Enforcement of attorneys lien is equitable—no right to jury trial, *Village of New Brighton v. Jamison* (Minn. 1979) 278 N.W.2d 321. Accord *Blazek v. North American Life Casualty* (Minn. 1963) 121

present case is the law of Idaho, which as noted above, interprets

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N.W.2d 339. In a suit to enforce attorneys lien, mere fact that attorneys fees rather than some other services involved did not exempt case from jury trial *Westerland v. Peterson* (Minn. 1923) 197 N.W.2d 110.

Missouri

Proceeding to establish amount of attorneys lien is equitable even though involves contract issues, *Young v. Levine* (Mo. 1930) 31 S.W.2d 978. In suit to establish and enforce attorneys lien, with clients contesting reasonableness of the fee, clients not entitled to jury trial *Fein v. Schwartz* (Mo.Ct.App. 1966) 404 S.W.2d 210.

Nebraska

Existence and enforcement of attorneys lien is equitable, *Kleager v. Schaneman* (Neb.1982) 322 N.W.2d 659.

New Jersey

Enforcement of attorney lien has jury trial right *Artale v. Columbia Ins. Co.* (N.J. 1932) 162 A. 585.

Oklahoma

Enforcement of attorneys lien where not seeking personal judgment, defendant is not entitled to jury trial, *City of Barnsdall v. Cornutt* (Okla. 1946) 174 P.2d 596, but "In an action brought for attorney fees, the issue as to what would be a reasonable fee for services rendered is an issue of fact to be determined by the jury," *Sarkey v. Haas,* (Okla. 1965) 402 P.2d 894, 899, and "In an action for a specified attorneys' fee, where the issue is joined as to what is a reasonable fee, such issue is for the jury, notwithstanding the plaintiff may pray that an equitable lien be decreed against defendant's land." *Wolfe v. Campbell* (Okla. 1924) 230 P. 506.

Oregon

The reasonableness of attorney's fees was a question for the jury. *Cox v. Alexander,* (Or. 1897) 30 Or. 438, 46 P. 794. Failure to submit the issue of reasonable value to the jury in an action to recover in quantum meruit was erroneous. *Whitten v. Griswold,* (Or. 1911) 60 Or. 318, 118 P. 1018.

Rhode Island

Existence of an attorney fees contract is a jury question, *Jacobs v. United Electric Rys. Co.* (R.I. 1924) 125 A. 286, 288.

Texas

Jury trial right on attorney fee claim in mandamus action *Accounting Search Consultants, Inc. v. Christensen* (Tex.Ct.App. 1984) 678 S.W.2d 593.

its jury trial right as identical to that protected by the Seventh Amendment. In *Jarman v. Hale* (Idaho 1986) 731 P.2d 813, 818, the Idaho Supreme Court reached the precise issue presented by the present case, and, relying upon *Simler*, concluded that the contract and "reasonableness" issues in an attorney fees dispute must be submitted to a jury even though they arise in the context of an equitable proceeding for imposition of a charging lien. *Jarman* and *Simler* were the authorities relied upon by Petitioner at trial, and rejected by the trial court. (Plaintiff's Memorandum in Opposition to Motion for Partial Enforcement of Attorneys' Lien, RA-XII, at 93).

In the closely analogous area of mechanics' liens, most state courts which have considered the issue have held that where an equitable proceeding is brought to impose or enforce a mechanics lien, counterclaims raising contractual issues or claims for damages must be submitted to a jury. Of particular note are the rules in Florida, Idaho, Iowa, Maryland and West Virginia, all of which, as noted above, are states which interpret their own constitutional civil jury right as essentially the same as the Seventh Amendment, and all of which hold that in a suit to impose or enforce a mechanics' lien, counterclaims for breach of contract or damages must be submitted to a jury. Additionally, New York courts, relying explicitly upon *Dairy Queen* and *Beacon Theatres*, supra, have reached the same conclusion.[28]

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Florida

In suit on mechanics lien, defendant in compulsory counterclaim for breach of contract is entitled to jury trial, *Construction Systems and Engineering v. Jennings Construction* (Fla.Dist.Ct.App. 1982) 413 So.2d 1236.

Idaho

In case of suit on mechanics lien with counterclaim for breach of contract, counterclaim jury is advisory if lien held valid, mandatory if lien held invalid. *Mitchell v. Flandro* (Idaho 1972) 506 P.2d 455.

Illinois

Defendant is entitled to jury trial on legal counterclaim to equitable proceeding to enforce mechanics lien, *Power Electric Contractors v. Maywood-Proviso State Bank* (Ill.App.Ct. 1978) 377 N.E.2d 142.

In summary, Hawaii appears in the present case to stand alone among those states which have incorporated the Seventh Amendment as a rule of construction into their own rules of civil procedure or constitutional jury-trial rights, in denying the right to a jury trial in a lien-enforcement proceeding in which there are "legal" defenses.

Indiana

Legal counterclaims to equitable mechanics lien enforcement may be decided by equity without jury. *Claise v. Bernardi* (Ind.Ct.App. 1980) 413 N.E.2d 609.

Iowa

An action to enforce a mechanics lien is tried to the court but counterclaim for breach of warranty is tried to jury, *Moore's Builder and Contractor v. Hoffman* (Iowa Ct.App. 1967) 409 N.W.2d 191.

Maryland

Enforcement of mechanics lien is triable to court, but counterclaim for breach of contract is triable to jury as of right *Kahle v. McDonough Builders, Inc.* (Md. App. 1990) 582 A.2d 557.

Missouri

Suit to establish mechanics lien with counterclaim for damages requires jury trial *Suburbia Pools v. Fischer* (Mo.Ct.App 1983) 661 S.W. 2d 823.

New York

Where answer to equitable petition for foreclosure of mechanics lien asserts breach of contract, there is a right to jury trial on the breach issue, *Stokes v. Johnson* (N.Y. App.Div. 1988) 526 N.Y.S. 2d 27. Accord when breach counterclaim raised, citing *Dairy Queen* and *Beacon Theatres, Cowper v. Buffalo Hotel Development Venture* (N.Y. App.Div.1984) 471 N.Y.S. 2d 913, 916, reversing *Cowper v. Buffalo Hotel Development Venture* (N.Y.Sup.Ct. 1983) 466 N.Y.S. 2d 568, which held no right to jury trial on legal counterclaim where combined with equitable counterclaim. In suit on foreclosure of mechanics lien, either side is entitled to jury trial on counterclaim for breach of contract *DiMenna v. Cooper and Evans Co.* (N.Y.App.Div. 1913) 140 N.Y.S. 680.

Ohio

Defendant in foreclosure on mechanics lien has right to jury trial both on amount of the lien when contested and on a counterclaim for breach

In briefing this issue, the parties below did not discuss Hawaiian caselaw except for *Harada v. Burns,* supra, and chiefly relied upon differing interpretations of *Simler,* supra. Respondent relied in particular upon *Petition of Rosenman & Colin* 850 F.2d 57, 60-61 (2nd Cir. 1988), in which the Court of Appeals held that the client is not entitled to a jury trial on contract issues in a proceeding brought by an attorney to enforce an attorney's charging lien. Ironically, the Court of Appeals relied upon a district court decision which in turn relied upon a 1901 case under the

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of contract, *Carl Sectional Home, Inc. v. Key Corp.* (Ohio Ct.App. 1981) 439 N.E. 2d 915.

Oklahoma

Waiver of personal judgment deprives defendants of jury trial in mechanics lien case, *Joe Brown Co. Inc. v. Best* (Okla. App. 1979) 601 P.2d 755. If issue joined as to indebtedness, either party entitled to jury trial *Scott v. Jones-Everett Machine Co.* (Okla. 1921) 200 P. 168.

Rhode Island

Filing of legal counterclaim in mechanics lien case doesn't entitle defendant to jury trial (R.I. 1990) 572 A.2d 1102.

South Dakota

No right to demand jury trial in suit to enforce mechanics lien despite fact that personal judgment could be rendered. *Gull River Lumber Co. v. Keefe* (S.D. 1889) 41 NW 743.

West Virginia

Right to jury trial on counterclaim for breach of contract on enforcement of mechanics lien, *Ballengee v. Kirby* (W.Va. 1978) 245 S.E.2d 847. To deny a jury trial on a breach-of-contract counterclaim to an enforcement of mechanics lien "denies a fundamental constitutional right," and the judgment is "void," *State ex rel, West Virginia Truck Stops, Inc. v. McHugh* (W.Va. 1977) 233 S.E.2d 729.

Wisconsin

Unless an equitable claim (including mechanics lien foreclosure) is brought in bad faith, the defendant is not entitled to jury trial on related legal claims or counterclaims, *Tri-State Home Improvement Co. Inc. v. Mansavage* (Wis.1977) 253 N.W.2d 474, 479. A defendant may be entitled to a jury trial on a mandatory legal counterclaim to an equitable claim, but waives right to jury on filing a noncompulsory counterclaim; *Mortgage Associates, Inc. v. Monona Shores, Inc.* (Wis. 1970) 177 N.W.2d 340, 345.

New York Constitution, *In Re King* (N.Y. 1901) 60 N.E. 1054, 1056; *see Rosenman et al v. Richard* 656 F.Supp. 196, 197-8 (S.D. N.Y. 1987). In any event, there is contrary authority from the DC Circuit: *National Life Insurance Co. v. Silverman* 454 F.2d 899, 905-6 (D.C. Cir. 1971), which held that the defendant in an action to foreclose a mortgage lien is entitled to a jury trial on a counterclaim for damages.

Simler, *Dairy Queen*, and *Beacon Theatres*, taken together, clearly require the result that has been reached in the attorney-lien context in Idaho, in the mechanics'-lien context in Florida, Idaho, Iowa, Maryland, New York and West Virginia, and in the mortgage-lien context in the D.C. Circuit. To hold otherwise would be clearly inconsistent with the "firm place in our history and jurisprudence" of the civil jury trial, *Dimick*, supra.

CONCLUSIONS

Although the Seventh Amendment is not incorporated into the Fourteenth Amendment due process clause, it *has* been incorporated in practice into the state constitutions of a number of states, including that of Hawaii. Similarly, although the jury trial right of FRCP Rule 38(a) is not directly enforceable against the states, that rule has been incorporated into the procedural rules of numerous states, including Hawaii.

The states which rely upon Federal precedent in this area, either as persuasive or as binding authority, have generally concluded that lien enforcement, although "equitable," cannot be litigated completely without a jury where there are inextricably intertwined "legal" issues. Hawaii, as illustrated by the present case, is an exception. Accordingly, this case meets the criteria of Supreme Court Rules 10.1(b) and 10.1(c), and certiorari should be granted.

An additional and very important reason for granting certiorari in this case is to clarify confusion which has arisen over the "federal question" jurisdiction of this Court. Specifically, Petitioner submits that the Court should grant certiorari to resolve the question of when if ever the state grounds for decision are "adequate" when a state court, resolving a question of state law,

relies upon incorrectly understood Federal precedent to reach result inconsistent with that precedent.

Independently, in this case, the size of the award ($1000 an hour) and the manner in which the award was considered and approved (over denial of a trial request, without giving reasons for the size of the award and assuming jurisdiction to consider the award on the basis of a motion, a procedure which is not authorized by the Hawaii statutes and rules) should be held to constitute a violation of due process and equal protection clauses of the Fifth Amendment in that they denied fundamental fairness to the appellant.

For these reasons, Petitioner prays that the writ be granted.

Date: April 30, 1991

Respectfully submitted.

EPHRAIM MARGOLIN
NICHOLAS C. ARGUIMBAU

By: EPHRAIM MARGOLIN
Attorneys for Petitioner

Appendix I

Opinion of the Hawaii Supreme Court

No. 14203

In the Supreme Court of
the State of Hawaii

Eugenie Parnar,
Plaintiff-Appellant,
Cross-Appellee,

vs.

Green, Ning, Lilly & Jones,
Movant-Appellee,
Cross-Appellant

and

Americana Hotels, Inc.,
Flagship International, Inc.,
Mark E. Liquori
Defendants.

Civ. No. 52878

Appeal from The Judgement and Order Granting Green, Ning, Lilly & Jones Motion for Enforcement of Attorneys' Lien Filed September 13, 1989

First Circuit Court

Honorable Robert G. Klein
Honorable Philip T. Chun
Honorable Hiroshi Oshiro,
Judges

[Filed]
[1991 Jan—9 PM 1:55]
[L. Nakagawa]
[Clerk Supreme Court]

MEMORANDUM OPINION

Plaintiff-Appellant and Cross-Appellee, Eugenie Parnar, (Parnar) appeals from the Judgment and Order Granting Green, Ning, Lilly & Jones' (GNLJ) Motion for Enforcement of Attorneys' Lien filed September 13, 1989.

Parnar asserts that the trial court erred in: (1) determining it had jurisdiction to award attorneys' fees; (2) denying the request for a jury trial; (3) awarding the attorneys' fees according to the contingency fee contract, when it was obtained under duress or fraud, terms were unexplained, or the fee was out of proportion to the value of services rendered; (5) awarding fees according to the contingency fee contract when the client discharged the attorney before the end of litigation; and (6) finding, in the alternative, the fee was reasonable under quantum meruit.

Movant-Appellee and Cross-Appellant, (GNLJ), cross-appeals on two grounds: (1) the trial court erred in denying their request for attorneys' fees under Hawaii Revised Statute (HRS) section 607-14; and (2) the trial court erred in extending Parnar's time to appeal.

On October 24, 1977, Parnar brought a wrongful termination suit against Americana Hotels, Inc. and Flagship International, Inc. (Americana) in the First Circuit Court. On January 30, 1987, the eve of trial, Parnar discharged the law firm of Dave Schutter and hired the law firm of Green, Ning, Lilly & Jones on a contingency fee basis. Parnar signed a fee agreement with GNLJ on February 2, 1987. The agreement provided GNLJ would represent Parnar in the trial and potential appeal of her case against Americana. In return, GNLJ would receive a contingency fee of 33.3% through trial and 40% after the filing of a notice of appeal, and GNLJ's fee would not be offset by any fees owed to prior attorneys in the case.

GNLJ tried the case. After the jury awarded Parnar $2,070,000 in damages, GNLJ successfully represented her in Americana's appeal to this Court. Americana moved for a stay of judgment pending review by the United States Supreme Court and this Court limited the stay to the amount of the punitive award of $1,500,000.

On November 8, 1988, Parnar discharged GNLJ. On July 3, 1989, the United States Supreme Court denied the Petition for Writ of Certiorari.

After a careful review of the record, we conclude that the trial court did not err in enforcing the fee agreement. We further conclude that, the trial court did not err in finding the fees requested by GNLJ to be reasonable.

As to the other grounds asserted by Parnar and by GNLJ on their cross-appeal, we find no reversible error.

Affirmed.

Dated: Honolulu, Hawaii, January 9, 1991.

Peter Van Name Esser
(Willard J. Peterson with
him on the brief) for
plaintiff-appellant,
cross-appellee.

[Herman Lum]
[Yoshimi Hayashi]
[James Wakatsuki]
[James S. Burns]
[Walter M. Heen]

Jerry M. Hiatt
(Crystal K. Rose with
him on the brief of Bays,
Deaver, Hiatt, Kawachika,
Lezak and Kodani) for
movant-appellee,
cross-appellant.

Appendix II

No. 14203

In the Supreme Court of
the State of Hawaii

Eugenie Parnar,
Plaintiff-Appellant,
Cross-Appellee,

vs.

Green, Ning, Lilly & Jones,
Movant-Appellee,
Cross-Appellant

and

Americana Hotels, Inc.,
Flagship International, Inc.,
Mark E. Liquori
Defendants.

Civ. No. 52878

Appeal from The Judgment and Order Granting Green, Ning, Lilly & Jones Motion for Enforcement of Attorneys' Lien Filed September 13, 1989

First Circuit Court

Honorable Robert G. Klein
Honorable Philip T. Chun
Honorable Hiroshi Oshiro,
Judges

Notice of Entry of Judgment on Appeal

To: The Honorable Presiding Judge of the Circuit Court of the First Circuit, State of Hawaii

PLEASE TAKE NOTICE that the Supreme Court of the State of Hawaii has entered the following Judgment on Appeal:

"Pursuant to the Memorandum Opinion of the Supreme Court of the State of Hawaii entered January 9, 1991, the

Judgment and Order Granting Green, Ning, Lilly & Jones' Motion for Enforcement of Attorneys' Lien filed on September 13, 1989, is affirmed. "

DATED: Honolulu, Hawaii January 31, 1991

By the Court:

L. NAKAGAWA

Clerk

The form of the foregoing Notice is approved and IT IS ORDERED that the same issue forthwith.

DATED: Honolulu, Hawaii January 31, 1991

JAMES H. WAKATSUKI

Justice

Appendix III

Excerpts from State Constitutional Provisions Regarding Civil Jury Trials

Alabama

Art. I, Sec. 11: "That the right of trial by jury shall remain inviolate."

Alaska

Art. I, Sec. 16: "In civil cases . . .the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. . ."

Arizona

Art. 2, Section 23: "The right of trial by jury shall remain inviolate. . ."

Arkansas

Art. 2, Sec. 7: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law. . ."

Colorado

Art.2, Sec. 23: "The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts. . ., may consist of less than twelve persons. . ."

Connecticut

Art. 1, Sec. 19: "The right of trial by jury shall remain inviolate. . ."

Delaware

Art. I, Sec. 4: "Trial by jury shall be as heretofore."

Florida

Art. I, Sec. 22: "The right of trial by jury shall be secure to all and remain inviolate. . ."

Georgia

Art. I, Sec. i Par. XI (a): "The right to trial by jury shall remain inviolate. . ."

Hawaii [text provided elsewhere herein]

Idaho

Art. I, Sec. 7: "The right of trial by jury shall remain inviolate. . ."

Illinois

Art. 1, Sec. 13: "The right of trial by jury as heretofore enjoyed shall remain inviolate."

Indiana

Art. 1, Sec. 20: "In all civil cases, the right of trial by jury shall remain inviolate."

Iowa

Art. I, Sec. 9: "The right of trial by jury shall remain inviolate. . ."

Kansas

Bill of Rights Sec. 5: "The right of trial by jury shall be inviolate."

Kentucky

Bill of Rights Sec. 7: "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate. . ."

Louisiana

[The Bill of Rights is Article I. Apparently there is no explicit constitutional civil jury trial right.]

Maine

Art. I, Sec. 20: "In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced. . ."

Maryland

Declaration of Rights Art. 23: ". . . The right of trial by jury of all issues of fact in civil proceedings in the several Courts of Law in this State. . . shall be inviolably preserved."

Massachusetts

Declaration of Rights Art. XV: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred. . ."

Michigan

Art. 1, Sec. 14: "The right of trial by jury shall remain. . ."

Minnesota

Art. 1, Sec. 4: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law. . ."

Mississippi

Art. 3, Sec. 30: "The right of trial by jury shall remain inviolate. . ."

Missouri

Art. 1, Sec. 22(a): "That the right of trial by jury as heretofore enjoyed shall remain inviolate. . ."

Montana

Art. II, Sec. 26: "The right of trial by jury is secured to all and shall remain inviolate. . ."

Nebraska

Art. I, Sec. 6: "The right of trial by jury shall remain inviolate. . ."

Nevada

Art. 1, Sec. 3: "The right of trial by jury shall be secured to all and remain inviolate forever. . ."

New Hampshire

Part I, Art. 20: "In all controversies concerning property, and in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed $1500 and no title to real estate is involved, the parties have a right to a trial by jury. . ."

New Jersey

Art. 1, Sec. 9: "The right of trial by jury shall remain inviolate. . ."

New Mexico

Art. II, Sec. 12: "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate. . . ."

New York

Art. I, Sec. 2: "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever. . ."

North Carolina

Art. I, Sec. 25: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities

of the rights of the people, and shall remain sacred and inviolable."

North Dakota

Art. I, Sec. 13: "The right of trial by jury shall be secured to all, and remain inviolate. . ."

Ohio

Art. 1, Sec. 5: "The right of trial by jury shall be inviolate. . ."

Oregon

Art. 1, Sec. 17: "In all civil cases the right of Trial by Jury shall remain inviolate."

Pennsylvania

Art. 1, Sec. 6: "Trial by jury shall be as heretofore, and the right thereof remain inviolate. . ."

Rhode Island

Art. 1, Sec. 15: "The right of trial by jury shall remain inviolate. . ."

South Carolina

Art. I, Sec. 14: "The right of trial by jury shall be preserved inviolate. . ."

South Dakota

Art. VI, Sec. 6: "The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy. . ."

Tennessee

Art. 1, Sec. 6: "That the right of trial by jury shall remain inviolate. . ."

Texas

Art. I, Sec. 15: "The right of trial by jury shall remain inviolate. . ."

Art. V, Sec. 10: "In the trial of all causes in The District Courts, the Plaintiff or Defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by The Legislature."

Utah

Art. I, Sec. 10: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

Virginia

Art. I, Sec. 11, par. 2: "That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. . ."

Washington

Art. 1, Sec. 21: "The right of trial by jury shall remain inviolate. . ."

West Virginia

Art. III, Sec. 13: "In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved. . ."

Wyoming

Art. 1, Sec. 9: "The right of trial by jury shall remain inviolate in criminal cases. A jury in civil cases and in criminal cases where the charge is a misdemeanor may consist of less than twelve (12) persons but not less than six (6), as may be prescribed by law. . ."